RETHINA DEVELOPMENT SDN. BHD.

v.

MAJLIS PERBANDARAN SEBERANG PERAI, BUTTERWORTH

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 31-466-88]
4 NOVEMBER 1989

LOCAL GOVERNMENT: *Payment of contribution for landscaping and tree planting - Payment of contribution for car park - Directive to developer to carry out landscaping and tree planting - Approval of principal lay-out plan by local planning authority - Developer to provide sufficient car parks - Submission of building plan for approval by Building Department - Direct to provide additional car parks - Appeal for reduction of car parks - Demand for monetary contribution in lieu of construction of additional car parks - Whether imposition and collection of monetary contribution a nullity - Local Government Act 1976 - Town and Country Planning Act 1976 - Street, Drainage and Building Act 1974.*

In this case the applicant (developer) had paid under protest, RM26,500 and RM33,300 to the respondent ("MPSP") as monetary contribution for tree planting and car parks respectively. The applicant sought declarations that the tree planting and car park contributions were *ultra vires* the legislations governing the local government authorities and therefore null and void. **Tree planting:** The applicant submitted and obtained planning permission to build flats and shophouses. The principal lay-out plan was approved subject to five conditions. The approved lay-out plan also contained a directive i.e., that the applicant fully understood that landscaping and tree planting would be carried out according to MPSP's requirement and that the applicant had agreed to pay monetary contribution at the rate fixed by them. The applicant paid the sum of RM26,500 under protest. The applicant contended that there was no provision in the law giving the MPSP or for that matter any local authority power to impose, demand or collect monetary contribution for landscaping and tree planting in housing schemes. **Car parks:** The applicant submitted the principal lay-out plan for approval and made provision for 154 car parks. The principal lay-out plan was approved subject to 5 conditions, one of which was that the applicant was to provide sufficient car parks. However, when the applicant submitted the building plan for approval, the MPSP sent it back with a directive to provide additional 111 car parks. Initially, the applicant confirmed his compliance with the additional condition but subsequently requested for a reduction in the number of car parks, which was rejected by MPSP. The applicant was asked to pay RM33,300 in lieu of construction of the additional car parks, which was paid under protest.

Held:

[1] The respondent (MPSP) was empowered under s. 21(3) of the Town and Country Planning Act 1976 to give directions to a developer for carrying out landscaping and planting of trees in a housing scheme;

[2] There was no provision in the law which empowers the MPSP and for that matter any local authority, to impose a condition on the approved lay-out plan or building plan that the applicant of the plan must pay monetary contribution in lieu of fulfilling a specific condition imposed therein;

[3] The MPSP had no power to impose the additional condition providing for 111 car parks after they had approved the principal lay-out plan under s. 22 of the Town Country Planning Act 1976;

[4] The MPSP have no power to add, amend or go behind the conditions imposed in the lay out plan once approval of the said plan was granted and any imposition of monetary contribution in lieu of physical construction of car parks in the said scheme is illegal and *ultra vires.*

[Order accordingly.]

Legislation referred to:
Street, Drainage and Building Act 1974, ss. 132, 132(1)
Town and Country Planning Act 1976, ss. 21(3)(g), 22(3)

For the applicant - E. Mayandi with G. Rethinasamy; M/s. Mayandi & Panjaram
For the respondent - Abdul Aziz bin Ibrahim & Anthonysamy s/o Selvanaikam; M/s. Aziz, Anthony & Co.

JUDGMENT

Mohamed Dzaiddin J:

By this application the applicant, who is the registered proprietor of a piece of land known as Lot 2978, Mukim 12, Province Wellesley North, ("the said land") and owner of a housing scheme constructed on the said land known as Taman Rethina ("the said scheme") sought several declarations against the respondent ("MPSP") in connection with the late issuance of the Occupation Certificate of Fitness (OCF) for the said scheme. However, as the OCF had been issued while this application was pending before me, the applicant now prays for the following declarations:

1. That the payment by the applicant to the respondent of the sum of RM26,500 for tree planting contribution is *ultra vires* the Local Government Act and is null and void and/ or alternatively the contribution of RM100 per unit of flat is very harsh and unconscionable.
2. That the car park contribution of RM33,300 paid by the applicant to the respondent is also *ultra vires* all of the legislations governing the local government authorities, repugnant and obnoxious to the healthy growth of the housing industry.
3. Consequently, an order that the applicant is entitled to the refund of RM26,500 and RM33,300 which was paid under protest to the respondent.

I shall now proceed to consider the two principal issues. First, I shall deal with the question of tree planting. What happened in this case was this. The applicant applied for and obtained planning permission to build 265 units of 5 storey walk up flats and 15 units of double storey shop houses for the said scheme. The said principal lay-out plan was approved by the MPSP on 23 June 1984 subject to five conditions. The issue of landscaping and tree planting was not included under the above conditions. However, the said approved lay-out plan contained a statement with a signature underneath it that the applicant had fully understood that he must carry out landscaping work and tree planting according to the MPSP's requirement, and that he had agreed to pay monetary contribution to the MPSP at the rate fixed by them. Further, there is also stated that 50% of the contribution must be settled before the applicant commenced construction work and the balance before the issuance of OCF. The MPSP had fixed the rate of contribution to be RM100 per unit of dwelling houses built. Therefore, in this case, the applicant was required to pay RM26,500 as contribution, which he paid in two stages under protest.

Both Encik Muniandi and later on Encik Rethinasamy submitted that there are no provisions in the Street, Drainage and Building Act 1974, Local Government Act 1976 and Town and Country Planning Act 1976 giving MPSP or for that matter any local authority power to impose, demand or collect monetary contributions for landscaping and tree planting in housing schemes. In fact, Counsel stated that MPSP were fully aware that this contribution has no force of law. The affidavit of Chew Ewe Guan, the respondent's director of engineering, affirmed on 15 July 1988 mentioned about a working paper prepared by the assistant director of building, who stated that the MPSP were aware that at the moment there was no provision in law to enforce the guidelines in respect of monetary contributions for landscaping and tree planting. For ease of reference, I reproduce below the relevant paragraph from the said working paper:

> Satu tabung yang berasingan hendaklah diwujudkan untuk sumbangan kewangan yang dipungut itu dan hendaklah digunakan semata-mata untuk tujuan ini.
>
> Jawatankuasa ini sedar bahawa tidak ada peruntukan Undang-undang dalam perundangan sekarang untuk menguatkuasakan garispanduan-garispanduan ini tetapi jawatankuasa ini juga sedar bahawa di Kuala Lumpur, Ipoh dan Johor Baharu, sumbangan-sumbangan yang serupa dikehendaki dibuat dan dipungut oleh pihakberkuasa-pihakberkuasa yang berkenaan. Demi mengadakan satu alam sekeliling yang lebih baik untuk pembayar-pembayar cukai kita, adalah dianggap bahawa garispanduan-garispanduan ini patutlah dilaksanakan oleh pihak Majlis.

It was further submitted that the collection of this contribution by MPSP had attracted the attention of the State Auditor, who in a letter to the secretary of MPSP dated 23 December 1985 queried about the contributions and opined that the respondent Council were not empowered under s. 132 of the Street, Drainage and Building Act 1974 ("the said Act") to collect any contributions. The Auditor then requested MPSP to refer the matter for the opinion of the State Legal Adviser Penang.

In reply, Encik Abdul Aziz, Counsel for the respondent, submitted that MPSP have the power to impose and collect contributions from the applicant for landscaping and tree planting under s. 70(3)(c) (which deals with conditions to be complied before the building plan is approved) and s. 132(1) of the said Act. Counsel stated that by implication s. 132(1) empowered MPSP to collect any contribution to be used towards the beautification of the said scheme. Counsel also stressed that as the applicant had agreed to pay for landscaping and tree planting contribution at the planning stage, he was therefore estopped from raising this issue in this application. Further, the respondent relied on s. 21(3)(g) of the Town and Country Planning Act 1976, which states that where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any other matter which the local planning authority considers necessary for purposes of planning. According to Counsel, landscaping and tree planting were considered necessary by the respondent in granting planning permission to the applicant. Lastly, Counsel submitted that if the MPSP could not legally collect contribution for the landscaping and tree planting, there was nothing to stop MPSP from accepting voluntary contribution from developers as agreed between the MPSP and SPEAD Council comprising surveyors, planners, engineers, architects and developers.

It is trite that the applicant in this case is bound by the conditions imposed by the MPSP in the approved principal lay-out plan of the said scheme. Section 22(3) of the Town and Country Planning Act 1976 gives power to the local planning authority to impose conditions upon the granting of planning permission. However, as for the landscaping and tree planting

condition, the applicant's director had acknowledged that she fully understood that the applicant must carry out landscaping and tree planting in the proposed scheme in accordance with the requirements of the MPSP.

In addition, s. 21(3) states:

> Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any of the following matters, that is to say:
>
> (a) the level of the site of the building;
>
> (b) the line of frontage with neighbouring buildings;
>
> (c) the elevations of the building;
>
> (d) the class, design, and appearance of the building;
>
> (e) the setting back of the building to a building line;
>
> (f) access to the land on which the building is to be erected; and
>
> (g) any other matter that the local planning authority considers necessary for purposes of planning.

In my opinion, any direction to a developer for carrying out landscaping and planting of trees in a housing scheme does come within the meaning of "any other matter" that the local planning authority considers necessary for purposes of planning. What more if it is the policy of the local planning authority to require developers to beautify their housing schemes. Thus, in the present case, the MPSP granted to the applicant planning permission based on the approved principal lay-out plan subject to conditions. The undertaking by the applicant to carry out landscaping and tree planting is sufficient to bind the applicant to comply with the stated direction. However, this is not the end of the matter. The crucial issue is: Can the MPSP in law demand from the applicant payment of monetary contribution for landscaping and tree planting in lieu of the applicant having not physically carried out the work? In may be recalled that the applicant had in fact agreed to pay monetary contribution to MPSP instead of carrying out the landscaping work and tree planting. This is stated in the principal lay-out plan. Be that as it may, after studying the provisions of the relevant Acts of Parliament, I cannot find any section which empowers the MPSP and for that matter, any local authority, to impose a condition on the approved lay-out or building plan that the applicant of the plan must pay monetary contribution in lieu of fulfilling a specific condition imposed therein. The nearest I could find was s. 132(1) of the Street, Drainage and Building Act 1974 which provides for the establishment of the "Improvement Service Fund" into which shall be paid all monies, including any contributions from any person towards the beautification, construction or laying out of any street etc. "Street" is defined in the same Act to include "any road, square, passage, service road, whether a thoroughfare or not, over which the public have a right of way. Incidentally, there was no evidence from MPSP that they have even established this fund as required under the law.

No doubt, MPSP could have agreed with SPEAD Council that members of their association undertake to beautify the housing scheme by planting trees or carry out landscaping work. There is also evidence that MPSP have drawn-up guidelines for monetary contributions. However, quite unfortunately, this consensus between the MPSP and SPEAD and the guidelines have no force of law.

Therefore, taking this matter as a whole, in my judgment, the MPSP have no power to impose and collect monetary contribution from the applicant for landscaping and tree planting in the said scheme. In the result, I order the MPSP to refund to the applicant the sum of RM26,500 with interest at 8% per annum from the date of payment by the applicant to MPSP until realisation. However, in view of my finding that MPSP have power to impose condition for landscaping and tree planting in the said scheme, I make a further order that the applicant shall comply with this condition as required by the MPSP as soon as possible.

Car Parks

On this issue of car parks, the following facts are not disputed. When the applicant's architect submitted five sets of the principal lay-out plan for approval by MPSP, being the local planning authority, he made provision in the said plan for 154 car parks for the said scheme. This principal lay-out plan was approved by MPSP at a full Council meeting on 23 June 1984 subject to five conditions, one of which was that the applicant was to provide sufficient car parks in accordance with the Council's standard requirement and supervision. Accordingly, the architect proceeded to prepare a building plan which was submitted to the Building Department for approval. But, on 31 January 1985, it was sent back by the MPSP with a direction to the applicant to provide additional 111 car parks making a total of 265 spaces which was made on the basis of one car park for every flat. From the above facts, it is clear that the condition to provide the additional 111 car parks was imposed by MPSP after the principal lay-out plan of the said scheme was approved on 23 June 1984 and before the Council deliberated on the question of the building plan.

On 7 February 1985 the applicant's architect resubmitted the building plan and confirmed by letter that the applicant had complied with this additional condition. On the same day, the applicant's developer also wrote to MPSP requesting them to expedite the approval of the building plan. When approval was given the applicant commended construction and after completion there was delay concerning the issuance of OCF for this scheme. Finally, the OCF for the said scheme was issued on 14 December 1988, not without problem, of course. It seems that on 3 November 1988, the applicant appealed for reduction of car parks from 265 spaces to 176. There was no reply until 14 December 1988 when the Director of Building informed the applicant by letter that MPSP would issue the OCF on condition the applicant paid to MPSP monetary contribution in lieu of the construction of 111 additional car parks which the applicant had failed to provide in the said scheme. The letter further mentioned that the applicant's appeal dated 3 November 1988 had been rejected. In such circumstances, the applicant was asked to pay the sum of RM33,300, which he had paid at a later date under protest.

Therefore, the question to be determined here is whether the MPSP have the power to impose additional condition providing for 111 car parks after they had approved the principal lay-out plan under s. 22 of the Town and Country Planning Act 1976.

Based on the above facts, in my judgment, the MPSP have no power to add, amend or go behind the conditions imposed in the lay-out plan once approval of the said plan was granted. My reasons are as follows. Clearly there are two separate Acts of Parliament which govern matters concerning the applicant's case. First, the Town and Country Planning Act 1976 ("the first Act") which deals with planning permission and secondly, the Street, Drainage and Building Act 1974 ("the second Act") which under Part V deals with building plans application. Basically, all applications for planning permission for development must be considered under the first Act since development includes the carrying out of any building operation. Such application shall therefore be made to the local planning authority, in this

case MPSP. Now, under s. 21(3) of the first Act once an application for planning permission is submitted the planning authority is empowered to give written directions to the applicant matters provided therein, e.g., the level of the site of the building, elevation of the building, the class, design and appearance of the building and any other matter that the local planning authority considers necessary for purposes of planning. Under subsection 4 the applicant shall then amend the plan submitted accordingly, and resubmit the said plan. The local planning authority shall decide on the application as soon as possible. It is important to stress here that s. 22(3) says that after taking into consideration the matters specified in subsection (2) the local planning authority may grant planning permission either absolutely or subject to such conditions as it thinks fit to impose or refuse to grant planning permission. Thus, applying the above provisions of the law to the present case, it is abundantly clear that after the applicant had submitted the principal lay-out plan, the full council of MPSP considered it and granted planning permission subject to five conditions, one of which was that the applicant was to provide sufficient car parks in accordance with the Council's standard requirements and supervision. It is material to the applicant's case that I should reproduce the said condition hereunder:

Diluluskan dengan syarat

1. ...
2. ...
3. ...
4. Tempat letak kereta hendaklah disediakan dengan secukupnya mengikut kepertaraan majlis dan diserahkan kepada majlis untuk penyelenggaraan.
5. ...

It can be seen from the approved principal lay-out plan that the applicant's architect had earlier made provision for 154 car parks, but when approval of the said plan was given by MPSP by MPSP one of the stated conditions was that the developer was only required to provide sufficient car parks in accordance with the Council's standard requirement. The condition above did not specifically state that 111 more car parks must be provided. It is patently clear to me that the issue of the applicant having to provide the additional 111 car parks only came into the picture at the time when the applicant's architect submitted building plans in respect of the said scheme for the approval of the MPSP. However, for building plans, the Council's powers come under s. 70(3) of the second Act. In simple language, this section says that no person shall erect any building without the prior written permission of the local authority and any person who intends to erect any building shall submit to the local authority such plans and specifications as may be required by the law. And subsection (3) says that no plan for the erection of the building shall be approved, until conditions (a), (b) and (c), which are, before any other conditions which the local authority may deem necessary to impose have been complied with. Thus, from the facts it is plain that the imposition of 111 additional car parks was made by the Council at the time when MPSP were considering the building plan. Therefore, when the secretary returned the said building plan together with five sets of the approved principal lay-out plan to the architect for necessary amendments, the instruction cannot be for amendment of the said approved lay-out plan because when dealing with the provision of s. 70 of the Second Act there cannot be further directions to be made on the approved lay-out plan by MPSP while they were considering the approval of the building plan. In the result, I hold that the MPSP is bound by their conditions as stated in the approved principal lay-out plan, which is for the construction of reasonable car parks by the applicant and subject to any specific figure stated in the conditions, 154 car parks is deemed to be reasonable in this case.

It follows from the above that any imposition of monetary contribution in lieu of physical construction of car parks in the said scheme is also illegal and *ultra vires.* Accordingly, I make an order that the respondent shall refund the sum of RM33,300 to the plaintiff with interest at 8% per annum from date of payment by the applicant to MPSP until realization.

Lastly, I grant costs of the application to the applicant to be taxed by the proper officer of the Court.

Also found at [1990] 1 CLJ 558